Alexsei

Memo To: All Lawyers
Folder: Alexsei Research Memo (Public)
Research ID: 40001503782c91
Jurisdiction: Ontario, Canada
Date: March 18, 2020
Regarding: Impact of COVID-19 On Duty To Accomodate

Issue

Does the employer have a duty to accommodate the person by allowing them to work from home?

Facts

The client is immunocompromised but the employer is refusing to allow them to work from home, despite the workplace potentially being infected by a pathogen or being otherwise hazardous to the employee.

Conclusion

Multiple pieces of legislation impact whether an employee is obliged to physically attend a workplace when doing so may be hazardous to their health

For one, the *Occupational Health and Safety Act*, at section 43, provides that a worker may refuse to work or to do particular work where he or she has reason to believe that any machine, equipment, device, or thing the worker is to use or operate is likely to endanger himself, herself, or another worker. Certain workers, listed in s.43(2), are excluded. A non-excluded worker may similarly refuse to work or do particular work where they have have a reason to believe that the physical condition of the workplace or the part thereof in which he or she works or is to work is likely to endanger him or herself. Further provisions exist allowing for refusal in cases of workplace violence, or where the physical condition of the workplace or machinery is in contravention of the Act. While section 43 gives an employee the right to refuse work when the situation is unsafe, it only covers physical hazards; the provisions of the OHSA focus primarily - if not exclusively - on physical hazards in the workplace, but this does include dangerous biological agents (*Musty v. Meridian Magnesium Products Limited*).

Further, the *Human Rights Code*, provides that every person has a right to equal treatment with respect to employment, without discrimination because of, among other things, disability. Disability is defined as including any degree of infirmity caused by bodily injury, birth defect, or illness. It includes, but is not limited to, diabetes, epilepsy, brain injury, lack of physical co-ordination, and others. Section 17 provides that a right of a person under the Code is not infringed for the reason only that the person is incapable of performing or fulfilling the essential duties attending the exercise of the right because of disability. However, no person shall be found incapable unless the tribunal is satisfied that the person cannot be accommodated without undue hardship.

The purpose of the duty to accommodate is to ensure that persons who are otherwise fit to work are not unfairly excluded where working conditions can be adjusted without undue hardship. The test is not whether it was impossible for the employer to accommodate the employee's characteristics. The employer does not have a duty to change working conditions in a fundamental way, but does have a duty, if it can do so without undue hardship, to arrange the employee's workplace or duties to enable the employee to do his or her work. The duty to accommodate may require arranging an employee's workplace in a way that enables the employee to perform the essential duties of his or her work. It does not require permanently changing the essential duties of a position or permanently assigning the essential duties of a position to other employees. The duty to accommodate also does not require exempting employees from performing the essential duties of their position. Each accommodation case must be decided upon the particular facts of that case. The accommodation process is an individualized process and similarly accommodation cases turn on their particular facts. Such cases turn upon the precise nature of the work being performed, the nature of the employee's work restrictions, and the nature of the workplace. Accommodation cases also often turn upon the identification of the essential duties or requirements of an employee's work or position. Not all duties that an employer may assign to a position will necessarily be "essential duties" within the meaning of the Code. The Tribunal will often require evidence to determine whether a duty is or is not essential (*Pourasadi v. Bentley Leathers Inc.*, 2015)

The applicant has the onus of proving a violation of the code on a balance of probabilities. If she succeeds in establishing a prima facie case of discrimination, the evidentiary burden shifts to the respondent to establish a statutory defence on a balance of probabilities. Despite this shift in the evidentiary burden, the overall burden of establishing discrimination remains with an applicant. A right is not infringed if they are incapable of performing the essential duties of a job with accommodation short of undue hardship. The duty to accommodate includes both a procedural

and a substantive component. The procedural duty to accommodate involves obtaining all relevant information about the employee's disability, at least where it is readily available. It could include information about the employee's current medical condition, the prognosis for recovery, ability to perform job duties, and capabilities for alternate work. The term undue hardship requires respondents in human rights cases to seriously consider how complainants could be accommodated. A failure to give any thought or consideration to the issue of accommodation, including what, if any, steps could be taken constitutes a failure to satisfy the "procedural" duty to accommodate. It was well established that an employer is required to withstand some degree of hardship, for example, economic hardship, to meet its duty to accommodate. It is only when the hardship becomes "undue" that the limits on the duty to accommodate will have been reached (*Pourasadi v. Bentley Leathers Inc.*, 2017)

Medical information is typically critical in the accommodation process. A person seeking accommodation also has other responsibilities. The person with a disability is required to:

1) advise the accommodation provider of the disability (although the accommodation provider does not generally have the right to know what the disability is)

2) make her or his needs known to the best of his or her ability, preferably in writing, so that the person responsible for accommodation may make the requested accommodation

3) answer questions or provide information regarding relevant restrictions or limitations, including information from health care professionals, where appropriate and as needed

4) participate in discussions regarding possible accommodation solutions

5) co-operate with any experts whose assistance is required to manage the accommodation process or when information is required that is unavailable to the person with a disability

6) meet agreed-upon performance and job standards once accommodation is provided

7) work with the accommodation provider on an ongoing basis to manage the accommodation process

8) discuss his or her disability only with persons who need to know. This may include the supervisor, a union representative or human rights staff

The accommodation process requires everyone to work together and to share information that is necessary and appropriate to allow the process to work (*Knight v. Surrey Place Centre*). In *Knight,* the employer told the applicant that she would be allowed to continue working from home if a report was received recommending this, but the employee only got such a report after being terminated. Ultimately, the Tribunal held that the applicant did not appropriately participate in the accommodation process when she refused to provide further medical information, and thus the employer did not infringe her rights under the Code.

Disability is defined under section 10 of the Code. Not all illnesses have been found to constitute a disability. The flu, for example, which is a temporary illness experienced by everyone from time to time is not a disability. To include commonplace illnesses under the ground of disability would have the effect of trivializing the Code's protections. The emphasis is on obstacles to full participation in society rather than on the condition or state of the individual (*Rouyer v. Toronto Atmospheric Fund*) Although no disability was found in Rouyer, the application was not dismissed because there were also allegations that the applicant had been forced to work remotely based on a perceived disability, which were not certain to fail.

Furthermore, the duty to accommodate arises only where an applicant has been subject to direct or adverse effects of discrimination. There is no free-standing duty to accommodate under the code. The applicant bears the onus of establishing a prima facie case of discrimination, which, if established, shifts the evidentiary burden to the respondent to show that it accommodated the applicant to the point of undue hardship. All parties to the accommodation process have obligations. An employee seeking accommodation is responsible for initiating the process by stating the need for accommodation and must act in a reasonable and cooperative manner. To trigger the duty to accommodate, it is sufficient that an employer be informed of the employee's disability-related needs and effects of the condition and how those needs and effects interact with the workplace duties and environment. As such, an employee does not necessarily have to disclose a detailed diagnosis of the disability for an employer to respond to a request for accommodation. Where working from home is alleged to be required due to an unsafe workplace, health and safety obligations, rather than Human Rights Code obligations, may be triggered (*Brouillette v. Northern Lights Canada*).

In *Geller v. Signarama Canada Inc.*, discrimination was established where an employer refused a worker's medically-backed request to work from home after she experienced acute kidney failure and was on medical leave. The employer was aware that the applicant's doctor advised she continue working from home but ceased paying her as previously agreed. The tribunal found she

was able to perform substantially all of her duties from home on an interim basis, and noted that other employees were permitted to work from home. The response to the disability-related need to work at home for a period of time was found discriminatory. By contrast, a refusal to allow a worker to work from home was held non-discriminatory in *Khalil v. Myplanet Internet Solutions Ltd.*, where the respondent was unaware that the request was a request for accommodation related to the worker's diabetes. The Tribunal in *Khalil* held that communication is an essential part of the accommodation process. Where a respondent is unaware of and has no reason to be aware of an accommodation need, there will not be a finding of liability, although in certain circumstances there may be a duty on an employer to inquire further even when an individual has not expressly made their disability needs known. However, this duty to inquire generally only arises where the respondent should have been aware that accommodation may have been required from the circumstances.

The Ontario Human Rights Commission has issued explicit guidance in the form of a policy statement found in *OHRC policy statement on the COVID-19 pandemic*, March 13, 2020 (accessed March 18, 2020). The Human Rights Commission notes specifically in relation to employment that employees with caregiving responsibilities should be accommodated to the point of undue hardship, which might include staying home. The policy statement further provides that employers should be sensitive to other factors, such as any particular vulnerability an employee may have (for example, if they have a compromised immune system). Employers should give employees flexible options, such as working remotely, where feasible, as a good practice and as an accommodation even if they are not currently sick but need to self-isolate or stay home due to other reasons related to COVID-19. Employers should take requests for accommodation in good faith, be flexible, and not overburden the health care system with requests for medical notes, particularly as unnecessary visits to medical officers increase the risk of exposure for all.

Law

Multiple pieces of legislation impact on whether am employee is obliged to physically attend a workplace when doing so may be hazardous to their health

In particular, the *Occupational Health and Safety Act*, RSO 1990, c O.1, at section 43, provides that a worker may refuse to work or to do particular work where he or she has reason to believe that any machine, equipment, device, or thing the worker is to use or operate is likely to endanger himself, herself, or another worker. Certain workers, listed in s.43(2), are excluded. A

non-excluded worker may similarly refuse to work or do particular work where they have have a reason to believe that the physical condition of the workplace or the part thereof in which he or she works or is to work is likely to endanger him or herself. Further provisions exists allowing for refusal in cases of workplace violence, or where the physical condition of the workplace or machinery is in contravention of the Act:

> Refusal to work
>
> Non-application to certain workers
>
> 43 (1) This section does not apply to a worker described in subsection (2),
>
> (a) when a circumstance described in clause (3) (a), (b), (b.1) or (c) is inherent in the worker's work or is a normal condition of the worker's employment; or
>
> (b) when the worker's refusal to work would directly endanger the life, health or safety of another person. R.S.O. 1990, c. O.1, s. 43 (1); 2009, c. 23, s. 4 (1).
>
> Idem
>
> (2) The worker referred to in subsection (1) is,
>
> (a) a person employed in, or a member of, a police force to which the Police Services Act applies;
>
> Note: On a day to be named by proclamation of the Lieutenant Governor, clause 43 (2) (a) of the Act is amended by striking out "a police force to which the Police Services Act applies" at the end and substituting "a police service to which the Community Safety and Policing Act, 2019 applies". (See: 2019, c. 1, Sched. 4, s. 39 (1))
>
> (b) a firefighter as defined in subsection 1 (1) of the Fire Protection and Prevention Act, 1997;
>
> (c) a person employed in the operation of,
>
> (i) a correctional institution or facility,
>
> (ii) a place of secure custody designated under section 24.1 of the Young Offenders Act (Canada), whether in accordance with section 88 of the Youth Criminal Justice Act (Canada) or otherwise,

(iii) a place of temporary detention under the Youth Criminal Justice Act (Canada), or

(iv) a similar institution, facility or place;

(d) a person employed in the operation of,

(i) a hospital, sanatorium, long-term care home, psychiatric institution, mental health centre or rehabilitation facility,

(ii) a residential group home or other facility for persons with behavioural or emotional problems or a physical, mental or developmental disability,

(iii) an ambulance service or a first aid clinic or station,

(iv) a laboratory operated by the Crown or licensed under the Laboratory and Specimen Collection Centre Licensing Act, or

(v) a laundry, food service, power plant or technical service or facility used in conjunction with an institution, facility or service described in subclause (i) to (iv). R.S.O. 1990, c. O.1, s. 43 (2); 1997, c. 4, s. 84; 2001, c. 13, s. 22; 2006, c. 19, Sched. D, s. 14; 2007, c. 8, s. 221.

Refusal to work

(3) A worker may refuse to work or do particular work where he or she has reason to believe that,

(a) any equipment, machine, device or thing the worker is to use or operate is likely to endanger himself, herself or another worker;

(b) the physical condition of the workplace or the part thereof in which he or she works or is to work is likely to endanger himself or herself;

(b.1) workplace violence is likely to endanger himself or herself; or

(c) any equipment, machine, device or thing he or she is to use or operate or the physical condition of the workplace or the part thereof in which he or she works or is to work is in contravention of this Act or the regulations and such contravention is likely to endanger himself, herself or another worker. R.S.O. 1990, c. O.1, s. 43 (3); 2009, c. 23, s. 4 (2).

The section goes on to provide for reporting of the refusal to work, and for an investigation of the circumstances to consider whether the worker's refusal was proper. Where, following investigation or steps taken to deal with the circumstances in question, the worker has reasonable grounds to believe that the danger continues, the worker may refuse to work and the employer or worker, or a person acting on either's behalf, shall cause an inspector to be notified thereof. Pending the investigation and decision of the inspector, no worker shall be assigned to use or operate the thing in question or to work in the workplace or part of the workplace being investigated, unless the worker has been advised of the other worker's refusal and the reasons therefor:

> Report of refusal to work
>
> (4) Upon refusing to work or do particular work, the worker shall promptly report the circumstances of the refusal to the worker’s employer or supervisor who shall forthwith investigate the report in the presence of the worker and, if there is such, in the presence of one of,
>
> (a) a committee member who represents workers, if any;
>
> (b) a health and safety representative, if any; or
>
> (c) a worker who because of knowledge, experience and training is selected by a trade union that represents the worker, or if there is no trade union, is selected by the workers to represent them,
>
> who shall be made available and who shall attend without delay. R.S.O. 1990, c. O.1, s. 43 (4).
>
> Worker to remain in safe place and available for investigation
>
> (5) Until the investigation is completed, the worker shall remain,
>
> (a) in a safe place that is as near as reasonably possible to his or her work station; and
>
> (b) available to the employer or supervisor for the purposes of the investigation. 2009, c. 23, s. 4 (3).
>
> Refusal to work following investigation

(6) Where, following the investigation or any steps taken to deal with the circumstances that caused the worker to refuse to work or do particular work, the worker has reasonable grounds to believe that,

(a) the equipment, machine, device or thing that was the cause of the refusal to work or do particular work continues to be likely to endanger himself, herself or another worker;

(b) the physical condition of the workplace or the part thereof in which he or she works continues to be likely to endanger himself or herself;

(b.1) workplace violence continues to be likely to endanger himself or herself; or

(c) any equipment, machine, device or thing he or she is to use or operate or the physical condition of the workplace or the part thereof in which he or she works or is to work is in contravention of this Act or the regulations and such contravention continues to be likely to endanger himself, herself or another worker,

the worker may refuse to work or do the particular work and the employer or the worker or a person on behalf of the employer or worker shall cause an inspector to be notified thereof. R.S.O. 1990, c. O.1, s. 43 (6); 2009, c. 23, s. 4 (4).

Investigation by inspector

(7) An inspector shall investigate the refusal to work in consultation with the employer or a person representing the employer, the worker, and if there is such, the person mentioned in clause (4) (a), (b) or (c). 2001, c. 9, Sched. I, s. 3 (11).

Decision of inspector

(8) The inspector shall, following the investigation referred to in subsection (7), decide whether a circumstance described in clause (6) (a), (b), (b.1) or (c) is likely to endanger the worker or another person. 2009, c. 23, s. 4 (5).

Idem

(9) The inspector shall give his or her decision, in writing, as soon as is practicable, to the employer, the worker, and, if there is such, the person mentioned in clause (4) (a), (b) or (c). R.S.O. 1990, c. O.1, s. 43 (9).

Worker to remain in safe place and available for investigation

(10) Pending the investigation and decision of the inspector, the worker shall remain, during the worker's normal working hours, in a safe place that is as near as reasonably possible to his or her work station and available to the inspector for the purposes of the investigation. 2009, c. 23, s. 4 (6).

Exception

(10.1) Subsection (10) does not apply if the employer, subject to the provisions of a collective agreement, if any,

(a) assigns the worker reasonable alternative work during the worker's normal working hours; or

(b) subject to section 50, where an assignment of reasonable alternative work is not practicable, gives other directions to the worker. 2009, c. 23, s. 4 (6).

Duty to advise other workers

(11) Pending the investigation and decision of the inspector, no worker shall be assigned to use or operate the equipment, machine, device or thing or to work in the workplace or in the part of the workplace being investigated unless, in the presence of a person described in subsection (12), the worker has been advised of the other worker's refusal and of his or her reasons for the refusal. R.S.O. 1990, c. O.1, s. 43 (11).

Idem

(12) The person referred to in subsection (11) must be,

(a) a committee member who represents workers and, if possible, who is a certified member;

(b) a health and safety representative; or

(c) a worker who because of his or her knowledge, experience and training is selected by the trade union that represents the worker or, if there is no trade union, by the workers to represent them. R.S.O. 1990, c. O.1, s. 43 (12).

> Entitlement to be paid
>
> (13) A person shall be deemed to be at work and the person's employer shall pay him or her at the regular or premium rate, as may be proper,
>
> (a) for the time spent by the person carrying out the duties under subsections (4) and (7) of a person mentioned in clause (4) (a), (b) or (c); and
>
> (b) for time spent by the person carrying out the duties under subsection (11) of a person described in subsection (12). R.S.O. 1990, c. O.1, s. 43 (13).

In *Musty v. Meridian Magnesium Products Limited*, 1996 CanLII 11127 (ON LRB), the Labour Relations Board inquired into a complaint of sexual harassment. Although not directly on-point, the decision is useful as it discusses the nature of hazards for which a refusal may be made. In particular, the Court held that the provisions of the OHSA focus primarily - if not exclusively - on physical hazards in the workplace, including for example dangerous biological agents. Section 43 gives an employee the right to refuse work when the situation is unsafe, but it only covers physical hazards:

> 128. The provisions of the OHSA focus primarily - if not exclusively - on physical hazards in the workplace: on machines, devices, things, equipment, protective devices, building structures, dangerous biological or physical agents, and so on. (See, for example, sections 8, 9, and 25, and the powers of an inspector under sections 54-60). Even the right to refuse unsafe work under section 43 focuses on the "equipment, machine, device or thing the worker is to use" or the "physical condition of the workplace". The physical element is either implicit in the hazard specifically identified, or has been added by the Legislature. as in section 43 which gives an employee the right to refuse to work when the situation is unsafe. If section 43 had been intended to cover any condition in the workplace, the word "physical" would not have been necessary.

The *Human Rights Code*, RSO 1990, c H. 19 provides that every person has a right to equal treatment with respect to employment, without discrimination because of, among other things, disability:

> Employment

> 5 (1) Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status or disability. R.S.O. 1990, c. H.19, s. 5 (1); 1999, c. 6, s. 28 (5); 2001, c. 32, s. 27 (1); 2005, c. 5, s. 32 (5); 2012, c. 7, s. 4 (1).

Disability is defined as including any degree of infirmity caused by bodily injury, birth defect, or illness. It includes, but is not limited to, diabetes, epilepsy, brain injury, lack of physical co-ordination, and others:

> "disability" means,
>
> (a) any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness and, without limiting the generality of the foregoing, includes diabetes mellitus, epilepsy, a brain injury, any degree of paralysis, amputation, lack of physical co-ordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, or physical reliance on a guide dog or other animal or on a wheelchair or other remedial appliance or device,
>
> (b) a condition of mental impairment or a developmental disability,
>
> (c) a learning disability, or a dysfunction in one or more of the processes involved in understanding or using symbols or spoken language,
>
> (d) a mental disorder, or
>
> (e) an injury or disability for which benefits were claimed or received under the insurance plan established under the Workplace Safety and Insurance Act, 1997; ("handicap")

Section 17 provides that a right of a person under the Code is not infringed for the reason only that the person is incapable of performing or fulfilling the essential duties attending the exercise of the right because of disability. However, no person shall be found incapable unless the tribunal is satisfied that the person cannot be accommodated without undue hardship:

> Disability

17 (1) A right of a person under this Act is not infringed for the reason only that the person is incapable of performing or fulfilling the essential duties or requirements attending the exercise of the right because of disability. R.S.O. 1990, c. H.19, s. 17 (1); 2001, c. 32, s. 27 (5).

Accommodation

(2) No tribunal or court shall find a person incapable unless it is satisfied that the needs of the person cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any. R.S.O. 1990, c. H.19, s. 17 (2); 1994, c. 27, s. 65 (2); 2002, c. 18, Sched. C, s. 3 (1); 2006, c. 30, s. 2 (1).

Determining if undue hardship

(3) In determining for the purposes of subsection (2) whether there would be undue hardship, a tribunal or court shall consider any standards prescribed by the regulations. 2006, c. 30, s. 2 (2).

(4) Repealed: 2006, c. 30, s. 2 (3).

The *Poursadi* series of decisions details the duty to accommodate and its scope. In *Pourasadi v. Bentley Leathers Inc.*, 2015 HRTO 138 (CanLII) the applicant alleged she was discriminated against because of disability contrary to the Code. In *Poursadi 2015*, the Court treated the s.17 analysis as a threshold issue. The applicant in the 2015 decision sought a declaration that the duty to accommodate under the Code required the employer to accommodate her by scheduling her alone and permitting her to ask customers who wish to see or purchase items to return later when doing so would require her to go outside her physical restrictions.

The Tribunal referred to a decision of the Supreme Court clarifying the goal and purposes of accommodation. The goal of accommodation is to ensure that an employee who is able to work can do so. In practice, this means that the employer must accommodate the employee in a way that, while not causing the employer undue hardship, will ensure that the employee can work. The purpose of the duty to accommodate is to ensure that persons who are otherwise fit to work are not unfairly excluded where working conditions can be adjusted without undue hardship. The test is not whether it was impossible for the employer to accommodate the employee's characteristics. The employer does not have a duty to change working conditions in a fundamental way, but does have a duty, if it can do so without undue hardship, to arrange the

employee's workplace or duties to enable the employee to do his or her work. The duty to accommodate may require arranging an employee's workplace in a way that enables the employee to perform the essential duties of his or her work. However, it does not require permanently changing the essential duties of a position or permanently assigning the essential duties of a position to other employees. The duty to accommodate also does not require exempting employees from performing the essential duties of their position. Each accommodation case must be decided upon the particular facts of that case. The accommodation process is an individualized process and similarly accommodation cases turn on their particular facts. Such cases turn upon the precise nature of the work being performed, the nature of the employee's work restrictions, and the nature of the workplace. Accommodation cases also often turn upon the identification of the essential duties or requirements of an employee's work or position. Not all duties that an employer may assign to a position will necessarily be "essential duties" within the meaning of the Code. The Tribunal will often require evidence to determine whether a duty is or is not essential:

> [26] For the reasons that follow, I find that the duty to accommodate under the Code does not require the respondent to accommodate the applicant by scheduling her to work alone in the store and permitting her to ask customers who wish to see or purchase items that would require the applicant to go outside her physical restrictions to return to the store at a time when other staff will be able to assist the customer.
>
> [27] The Supreme Court of Canada discussed the goal and purposes of accommodation in *Hydro-Québec v. Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000* (SCFP-FTQ), 2008 SCC 43 at paras. 14 and 16:
>
> ... the goal of accommodation is to ensure that an employee who is able to work can do so. In practice, this means that the employer must accommodate the employee in a way that, while not causing the employer undue hardship, will ensure that the employee can work. The purpose of the duty to accommodate is to ensure that persons who are otherwise fit to work are not unfairly excluded where working conditions can be adjusted without undue hardship.
>
> (…)
>
> The test is not whether it was impossible for the employer to accommodate the employee's characteristics. The employer does not have a duty to change working

> conditions in a fundamental way, but does have a duty, if it can do so without undue hardship, to arrange the employee's workplace or duties to enable the employee to do his or her work.
>
> [28] As the Tribunal has held in many cases, the duty to accommodate may require arranging an employee's workplace in a way that enables the employee to perform the essential duties of his or her work. However, it does not require permanently changing the essential duties of a position or permanently assigning the essential duties of a position to other employees. The duty to accommodate also does not require exempting employees from performing the essential duties of their position. See *Brown v. Children's Aid Society of Toronto*, 2012 HRTO 1025 at para. 99; *Briffa*, above, at para. 60; *Yeats*, above, at paras. 58 and 59; *Perron*, above, at para. 16.
>
> [29] Each accommodation case must be decided upon the particular facts of that case. The accommodation process is an individualized process and similarly accommodation cases turn on their particular facts. These cases turn upon the precise nature of the work being performed, the nature of the employee's work restrictions, and the nature of the workplace. Accommodation cases also often turn upon the identification of the essential duties or requirements of an employee's work or position. I agree with the applicant that not all duties that an employer may assign to a position will necessarily be "essential duties" within the meaning of the Code. I also agree that the Tribunal will often require evidence to determine whether a duty is or is not an essential duty.

Further helpful guidance can be found in *Pourasadi v. Bentley Leathers Inc.*, 2017 HRTO 1418 (CanLII), which was a later decision in the *Poursadi* series. In *Poursadi 2017*, the Tribunal considered whether the applicant's termination was discrimination on the basis of disability.

The Tribunal held that the applicant has the onus of proving a violation of the code on a balance of probabilities. If she succeeds in establishing a prima facie case of discrimination, the evidentiary burden shifts to the respondent to establish a statutory defence on a balance of probabilities. Despite this shift in the evidentiary burden, the overall burden of establishing discrimination remains with an applicant. A right is not infringed if they are incapable of performing the essential duties of a job with accommodation short of undue hardship. The duty to accommodate includes both a procedural and a substantive component:

> [108] It is well established that the applicant has the onus of proving a violation of the Code on a balance of probabilities. If an applicant is able to establish a prima facie case of discrimination, the evidentiary burden shifts to the respondent to establish a statutory defence on a balance of probabilities. Despite this shift in the evidentiary burden, the overall burden of establishing discrimination remains with an applicant. *Peel Law Association v. Pieters*, 2013 ONCA 396 (CanLII) at para. 83 and *Ontario (Disability Support Program) v. Tranchemontagne*, 2010 ONCA 593 (CanLII) at para. 109.
>
> [109] Section 17 of the Code provides a defence to claims of disability-related discrimination. It provides that a right is not infringed where the person claiming the right is incapable of performing the essential duties of a job with accommodation short of undue hardship.
>
> [110] It is well accepted in the case law that the duty to accommodate includes both a procedural and substantive component. See *Adga Group Consultants Inc. v. Lane*, 2008 CanLII 39605 (ON SCDC), 91 O.R. (3d) 649 at para. 104 (“ADGA”).

The procedural duty to accommodate involves obtaining all relevant information about the employee's disability, at least where it is readily available. It could include information about the employee's current medical condition, prognosis for recovery, ability to perform job duties, and capabilities for alternate work. The term undue hardship requires respondents in human rights cases to seriously consider how complainants could be accommodated. A failure to give any thought or consideration to the issue of accommodation, including what, if any, steps could be taken constitutes a failure to satisfy the "procedural" duty to accommodate:

> [111] The Divisional Court in *ADGA* (at para. 107) described the procedural component of the duty to accommodate as follows:
>
> The procedural duty to accommodate involves obtaining all relevant information about the employee's disability, at least where it is readily available. It could include information about the employee's current medical condition, prognosis for recovery, ability to perform job duties and capabilities for alternate work. The term undue hardship requires respondents in human rights cases to seriously consider how complainants could be accommodated. A failure to give any thought or consideration to the issue of accommodation, including what, if any, steps could be taken constitutes a failure to satisfy the "procedural" duty to accommodate.”

As previously noted, the goal of accommodation is to ensure that an employee who is able to work can do so. In practice, this means that the employer must accommodate the employee in a way that, while not causing the employer undue hardship, will ensure that the employee can work. The duty to accommodate may require arranging an employee's workplace in a way that enables the employee to perform the essential duties of his or her work. However, it does not require permanently changing the essential duties of a position or permanently assigning the essential duties to other employees:

> [134] The Supreme Court of Canada discussed the goal and purposes of accommodation in *Hydro-Québec*, above, at paras. 14 and 16:
>
> ... the goal of accommodation is to ensure that an employee who is able to work can do so. In practice, this means that the employer must accommodate the employee in a way that, while not causing the employer undue hardship, will ensure that the employee can work. The purpose of the duty to accommodate is to ensure that persons who are otherwise fit to work are not unfairly excluded where working conditions can be adjusted without undue hardship.
>
> (…)
>
> The test is not whether it was impossible for the employer to accommodate the employee's characteristics. The employer does not have a duty to change working conditions in a fundamental way, but does have a duty, if it can do so without undue hardship, to arrange the employee's workplace or duties to enable the employee to do his or her work.
>
> [135] As the Tribunal has held in many cases, the duty to accommodate may require arranging an employee's workplace in a way that enables the employee to perform the essential duties of his or her work. However, it does not require permanently changing the essential duties of a position or permanently assigning the essential duties of a position to other employees. The duty to accommodate also does not require exempting employees from performing the essential duties of their position. See *Brown v. Children's Aid Society of Toronto*, 2012 HRTO 1025 at para. 99; *Briffa v. Costco Wholesale Canada Ltd.*, 2012 HRTO 1970 at para. 60; *Yeats v. Commissionaires Great Lakes*, 2010 HRTO 906 at paras. 58-59; and *Perron v. Revera Long Term Care Inc.*, 2014 HRTO 766 at para. 16.

The Tribunal held it was well established that a respondent is required to withstand some degree of hardship, for example, economic hardship, to meet its duty to accommodate. It is only when the hardship becomes "undue" that the limits on the duty to accommodate will have been reached. In appropriate cases this may require employers to essentially create a new position within the restrictions of employees requiring accommodation by taking duties from existing positions, in a process known as "bundling":

> [137] I also am not persuaded that any bundling of duties was an option in this case. As noted above, the applicant claimed that the respondent could have bundled duties that she was capable of doing including the managerial duties, working the cash and doing mark ups and mark downs. In *Vanegas v. Liverton Hotels International Inc.*, 2011 HRTO 715 ("*Vanegas*"), the Tribunal concluded that the duty to accommodate may, in appropriate circumstances, require an employer to "bundle" or take duties from existing positions to essentially create a new position within the restrictions of employees requiring accommodation, unless such "bundling" results in undue hardship to the employer. It is well established that a respondent is required to withstand some degree of hardship (for example economic hardship) to meet its duty to accommodate. It is only when the hardship become "undue" that the limits on the duty to accommodate will have been reached. The Tribunal has held that would be undue hardship for an employer to continue employing an employee who is incapable of performing a useful and productive job in the context of the employer's operation. See *Vanegas*, above, at para. 139.

Working from home, as an accommodation, was discussed in *Knight v. Surrey Place Centre*, 2019 HRTO 482 (CanLII) in the context of a worker who experiences stress-related symptoms. The applicant in *Knight* received a doctor's note indicating that she ought to work from home. The employer argued that there ceased to be a medical reason to continue the work-from-home arrangement. The applicant argued to the employer that working from home did not preclude her from fulfiling her duties and that she had to be accommodated. The employer told her she would be allowed to continue working from home after a report was received recommending this, but the employee only got this report after being terminated.

The Tribunal set out the obligations of the employee within the accommodation process. The Tribunal noted that medical information is typically critical in the accommodation process:

> [100] As noted earlier, the respective obligations of the employee and the employer regarding accommodation of disability are discussed in the Ontario Human Rights

Commission Policy and guidelines on Disability and the Duty to accommodate, a document relied on by the applicant to support her case. That policy states as follows with respect to the obligations of the employee:

The person with a disability is required to:

• advise the accommodation provider of the disability (although the accommodation provider does not generally have the right to know what the disability is)

• make her or his needs known to the best of his or her ability, preferably in writing, so that the person responsible for accommodation may make the requested accommodation

• answer questions or provide information regarding relevant restrictions or limitations, including information from health care professionals, where appropriate and as needed

• participate in discussions regarding possible accommodation solutions

• co-operate with any experts whose assistance is required to manage the accommodation process or when information is required that is unavailable to the person with a disability

• meet agreed-upon performance and job standards once accommodation is provided

• work with the accommodation provider on an ongoing basis to manage the accommodation process

• discuss his or her disability only with persons who need to know. This may include the supervisor, a union representative or human rights staff.

[101] These points, together with the expectations on employers (quoted above), show that the accommodation process requires everyone to work together and to share information that is necessary and appropriate to allow the process to work. The process is not likely to work very well if the employee feels that she can unilaterally impose the conditions of any accommodation. In this process, medical information is typically critical. As the applicant submits, it is true that an employer cannot simply reject out of hand a request for accommodation that is medically supported. However,

> in this case, the medical support for the accommodation of working from home was very limited.

Ultimately, the Tribunal held that the applicant did not appropriately participate in the accommodation process when she refused to provide further medical information, and thus the employer did not infringe her rights under the Code:

> [173] With respect to the applicant's request for accommodation to allow her to work from home, I have found that the applicant did not appropriately participate in the accommodation process when she refused to provide any further medical information. The respondent did not therefore infringe the applicant's rights under the Code with respect to this issue.

A request to work from home was also central in *Brouillette v. Northern Lights Canada*, 2012 HRTO 159 (CanLII). In *Brouillette*, the applicant suffered a hip injury, which combined with pre-existing fibromyalgia resulted in the applicant being confined to a wheelchair. She requested to work from home, but this was denied, allegedly due to a requirement to meet clients. Employees who had contracted H1N1 were permitted to work from home. Another co-worker was also permitted to work from home because her son was ill. The applicant alleged that this differential treatment was discrimination because of disability and family status.

The Tribunal held that the duty to accommodate arises only where an applicant has been subject to direct or adverse effects of discrimination. There is no free-standing duty to accommodate under the code. The applicant bears the onus of establishing a prima facie case of discrimination, which, if established, shifts the evidentiary burden to the respondent to show that it accommodated the applicant to the point of undue hardship. All parties to the accommodation process have obligations. An employee seeking accommodation is responsible for initiating the process by stating the need for accommodation and must act reasonably and cooperatively. To trigger the duty to accommodate, it is sufficient that an employer be informed of the employee's disability-related needs and effects of the condition and how those needs and effects interact with the workplace duties and environment. As such, an employee does not necessarily have to disclose a detailed diagnosis of the disability in order for an employer to respond to a request for accommodation:

> [38] As the Tribunal noted in *Baber v. York Region District School Board*, 2011 HRTO 213, the duty to accommodate is not a free standing obligation under the Code. Rather, it arises only pursuant to sections 11, 17 or 24 of the Code where a person is

> disadvantaged because of a prohibited ground of discrimination. In other words, the duty to accommodate arises only where an applicant has been subject to direct or adverse effect discrimination. The applicant bears the onus of establishing a prima facie case of discrimination, which, if established, shifts the evidentiary burden to the respondent to show that it accommodated the applicant to the point of undue hardship.
>
> [39] All parties to the accommodation process have obligations. An employee seeking accommodation, for example, is responsible for initiating the process by stating the need for accommodation and must act in a reasonable and cooperative manner. See for example, *Central Okanagan School District No. 23 v. Renaud*, 1992 CanLII 81 (SCC), [1992] 2 S.C.R. 970 at page 31. In *Simpson v. Commissionaires (Great Lakes),* 2009 HRTO 1362, the Tribunal described how the duty to accommodate is triggered at paragraph 35:
>
> In order to trigger the duty to accommodate, it is sufficient that an employer be informed of the employee's disability-related needs and effects of the condition and how those needs and effects interact with the workplace duties and environment. As such, an employee does not necessarily have to disclose a detailed diagnosis of the disability in order for an employer to respond to a request for accommodation. This is not to detract from the well-established principle that accommodation is a collaborative process and the applicant should endeavour to provide as much information as possible to facilitate the search for accommodation.

Part of the work from home arrangement, towards the end, resulted from comments made to the applicant by her employer. The Tribunal noted that the statement itself did not trigger the Code provisions, but that it might result from the applicant's right to a safe workplace which is a health and safety matter:

> [50] Even assuming the alleged statement could be interpreted as a threat, it could not, in my view, amount to a reprisal under the Code. The work from home arrangement arose out of allegations of workplace violence and the applicant asserting her right to a safe workplace, which are health and safety matters outside the ambit of the Code. The threat attributed to Ms. Blake allegedly occurred because the applicant did not follow a plan to address her workplace safety and not because she sought to enforce her rights under the Code.

In *Rouyer v. Toronto Atmospheric Fund*, 2017 HRTO 1534 (CanLII), the applicant alleged discrimination with respect to employment because of disability after he was refused the ability to work from home. The applicant alleged that the air quality in the employer's offices was poor which triggered his environmental sensitivities and resulted in coughing and other symptoms. The employer terminated him before the end of his probationary period on the basis that his on the job performance did not satisfy its requirements. The employer maintained that it accommodated the applicant's cough by letting him work from home more frequently. The Tribunal held that the allegations of discrimination had no reasonable prospect of success.

As noted, disability is defined under section 10 of the Code. Not all illnesses have been found to constitute a disability. The flu, for example, which is a temporary illness experienced by everyone from time to time is not a disability. To include commonplace illnesses under the ground of disability would have the effect of trivializing the Code's protections. The emphasis is on obstacles to full participation in society rather than on the condition or state of the individual. The Tribunal pointed to the lack of medical evidence:

> [37] Disability is defined under section 10 of the Code and includes:
>
> Any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness and, without limiting the generality of the foregoing, includes diabetes mellitus, epilepsy, a brain injury, any degree of paralysis, amputation, lack of physical co-ordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, physical reliance on a guide dog or other animal or on a wheelchair or other remedial appliance or device […]
>
> [38] Not all illnesses have been found to constitute a disability under the Code. See *Anderson v. Envirotech Office Systems*, 2009 HRTO 1199. In *Ouimette v. Lily Cups Ltd*. (1990), 12 C.H.R.R. D/19, the Board of Inquiry found that the flu, a temporary illness which is experienced by everyone from time to time, is not a disability. The Board found that to include commonplace illnesses under the ground of disability would have the effect of trivializing the Code's protections.
>
> [39] Even where the courts have applied a broad and contextual definition to the notion of disability, everyday illnesses have been excluded. On this point, the Supreme Court of Canada in Québec (*Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City)*, 2000 SCC 27 states:

> As the emphasis is on obstacles to full participation in society rather than on the condition or state of the individual, ailments (a cold, for example) or personal characteristics (such as eye colour) will necessarily be excluded from the scope of "handicap" […]
>
> [40] The applicant is unable to point to any medical evidence in his possession or that may be reasonably available to him to support his claim that he suffered from pulmonary conditions or environmental sensitivities while employed with the respondent. The only medical information that the applicant provided is a note from a physician dated in 2017 that states that he has had respiratory complaints in the past and that testing had been arranged for him in 2015. The applicant did not attend such testing. The second medical document provides results of pulmonary testing that the applicant took in the summer 2017, well after he was terminated. The test results are normal.

Nevertheless, the application was not dismissed because there were also allegations that the applicant had been forced to work remotely on the basis of a perceived disability, which was not certain to fail:

> [43] Notwithstanding my conclusion that the applicant will be unable to establish that he has a disability, I find that this is not determinative of the summary hearing. The applicant mentioned at the summary hearing that the respondent discriminated against him because it thought that the applicant's work performance was negatively affected by the fact that he worked remotely. He maintains that he was forced to work remotely because of his sensitivity to the air quality in the workplace. On February 23, 2015, the applicant highlighted the coughing he was experiencing in the office, raised the issue of the air quality in the office, mentioned to his supervisor that he would "try to work remotely a bit more" and on March 6, 2015 he was terminated. During the termination meeting, the applicant alleges that the CEO commented on his absence from the office that morning.
>
> [44] The parties did not make submissions on whether a perceived disability may have contributed to the reasons for the applicant's termination. However, the applicant is a self-represented litigant and it would be in my view inappropriate to dismiss the Application as a whole on the ground that he failed to argue that a perceived disability may have been a contributing factor in the decision to terminate him. I cannot find that these allegations concerning perceived disability have no reasonable prospect of

> success. Pursuant to Rule 19.6A, where the Tribunal decides not to dismiss an Application following a summary hearing, it need not give reasons and I find it unnecessary to comment further.

In *Geller v. Signarama Canada Inc.*, 2018 HRTO 1305 (CanLII) discrimination was found where an applicant's request to work from home was denied by her employer after she experienced acute kidney failure. The employer was aware that the applicant's doctor advised she continue working from home, but ceased paying her. The tribunal found she was able to perform substantially all of her duties from home on an interim basis, and noted that other employees were permitted to work from home. The response to the disability-related need to work at home for a period of time was found discriminatory:

> [24] I find based on the uncontradicted evidence of the applicant that she was at the material times a person with a disability related need for accommodation. I find based on the evidence of the applicant supported by the exhibits attached to her affidavit that when she asked to work at home as recommended by her treating physician the respondent changed her remuneration from salary and commission to straight commission. I find that the applicant was able to perform substantially all of her duties from home on an interim basis. I also find that other employees were treated differently in this regard in that they were allowed to work from home without consequence. In my view, the respondents' response to the applicant's disability related need to work at home for a period of time was discriminatory.

By contrast, a refusal to allow a worker to work from home was held non-discriminatory in *Khalil v. Myplanet Internet Solutions Ltd.*, 2019 HRTO 1248 (CanLII), where the respondent was unaware that the request was a request for accommodation related to the worker's diabetes. The Tribunal held that communication is an essential part of the accommodation process. Where a respondent is unaware of, and has no reason to be aware of an accommodation need, there will not be a finding of liability, although in certain circumstances there may be a duty on an employer to inquire further even when an individual has not expressly made their disability needs known. However, this duty to inquire generally only arises where the respondent should have been aware that accommodation may have been required from the circumstances:

> [30] Communication is an essential part of the accommodation process. Where a respondent is unaware of, and has no reason to be aware of an accommodation need, there will not be a finding of liability. See *Macanovic v. Toronto Public Library*, 2014 HRTO 1592, at paragraphs 10-16.

> [31] I agree that in certain circumstances where an individual has not expressly made their disability needs known, there may nonetheless be a duty on a respondent to inquire further. In *Sears v. Honda of Canada Mfg*., 2014 HRTO 45 ("Sears") at paragraphs 128,
>
> . . . the procedural duty to accommodate, including the duty to inquire into the situation of the person needing accommodation, can arise without a specific request for accommodation by the individual in circumstances in which there is reason to believe that the individual is having difficulty in an area included in Part 1, because of personal characteristics protected by the Code.
>
> [32] Though a respondent may have a duty to inquire even where there has not been a specific accommodation request, this duty has generally only arisen in situations where the respondent should have been aware that an accommodation may be required from the circumstances. See *Wall v. Lippé Group*, 2008 HRTO 50, at paragraph 80.
>
> [33] In the present case, I cannot find that the respondents should have been aware that the applicant's request to work from home, or to work in the quiet room, were requests for accommodation related to his diabetes. He acknowledged that he had not specifically made these as an accommodation request, again because he felt doing so would give a bad impression. The result is, however, that I cannot find that the respondents failed to meet their obligations under the duty to accommodate.

Finally, the Ontario Human Rights Commission has issued a policy statement in relation to the COVID-19 crisis, it can be found here: *OHRC policy statement on the COVID-19 pandemic*, March 13, 2020 (accessed March 18, 2020). The Human Rights Commission notes specifically in relation with employment that employees with care-giving responsibilities should be accommodated to the point of undue hardship, which might include staying home. Further, the policy statement explicitly provides that employers should be sensitive to other factors, such as any particular vulnerability an employee may have (for example, if they have a compromised immune system). Employers should give employees flexible options, such as working remotely, where feasible, as a good practice and as an accommodation even if they are not currently sick but need to self-isolate or stay home due to other reasons related to COVID-19. Employers should take requests for accommodation in good faith, be flexible, and not overburden the health care system with requests for medical notes, particularly as unnecessary visits to medical officers increase risk of exposure for all:

An employee who has care-giving responsibilities should be accommodated to the point of undue hardship, which might include staying home. These care-giving responsibilities which relate to the Code ground of family status could include situations where another family member is ill or in self-isolation, or where their child's school is closed due to COVID-19.

Employers should be sensitive to other factors such as any particular vulnerability an employee may have (for example, if they have a compromised immune system).

Employers should give employees flexible options, such as working remotely where feasible, as a good practice, and as an accommodation even if they are not currently sick but need to self-isolate or stay home due to other reasons related to COVID-19.

Consistent with the OHRC's Policy on ableism and discrimination based on disability and its Policy position on medical documentation to be provided when a disability-related accommodation request is made, employers should take requests for accommodation in good faith. Employers should be flexible and not overburden the health care system with requests for medical notes. Unnecessarily visiting medical offices increases further risk of exposure for everyone.

Authorities

Occupational Health and Safety Act, RSO 1990, c O.1
Musty v. Meridian Magnesium Products Limited, 1996 CanLII 11127 (ON LRB)
Human Rights Code, RSO 1990, c H. 19
Pourasadi v. Bentley Leathers Inc., 2015 HRTO 138 (CanLII)
Pourasadi v. Bentley Leathers Inc., 2017 HRTO 1418 (CanLII)
Peel Law Association v. Pieters, 2013 ONCA 396 (CanLII)
Ontario (Disability Support Program) v. Tranchemontagne, 2010 ONCA 593 (CanLII)
Adga Group Consultants Inc. v. Lane, 2008 CanLII 39605 (ON SCDC)
Knight v. Surrey Place Centre, 2019 HRTO 482 (CanLII)
Brouillette v. Northern Lights Canada, 2012 HRTO 159 (CanLII)
OHRC policy statement on the COVID-19 pandemic, March 13, 2020 (accessed March 18, 2020)
Rouyer v. Toronto Atmospheric Fund, 2017 HRTO 1534 (CanLII)
Geller v. Signarama Canada Inc., 2018 HRTO 1305 (CanLII)
Khalil v. Myplanet Internet Solutions Ltd., 2019 HRTO 1248 (CanLII)